NO. 71-110

Supreme Court of the United States

October Term, 1971

Supreme Court, U.S.
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E. ROBERT SEAVER, CLERK

DAVID GELBARD and SIDNEY PARNAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER GELBARD

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With the addition of the authorities herein cited petitioner Gelbard adopts the authorities in the brief in the instant case titled "Brief for Petitioners."

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QUESTIONS PRESENTED

Petitioner Gelbard adopts herein the Questions Presented in the brief submitted in the instant case under the title "Brief for Petitioner" and submits the following question for resolution:

1. Whether the Constitution and statutes of the United States require that an evidentiary hearing be afforded a grand jury witness on motion to enjoin the judicial and executive branches of the government from utilizing evidence obtained by virtue of the federal wire tap statutes (18 U.S.C. § 2510, *et seq.*), where there is cause to believe said evidence was unconstitutionally and unlawfully obtained.

SUMMARY OF THE ARGUMENT

Petitioner Gelbard adopts *in toto* the argument in the brief submitted under the title "Brief for Petitioners" in the instant case. However, petitioner would like to present certain aspects of the case in a slightly different context and to explore the nature of the hearing to be granted under the facts of this case.

Initially, petitioner maintains that the federal wire tap statute and 28 U.S.C. § 1826 (under which petitioner was incarcerated) must be construed to allow a hearing to petitioner in order to avoid certain constitutional infirmaties which would otherwise arise. This Court has recently made clear the absolute necessity for a hearing under a variety of circumstances ranging from seizure of film to imposition of contempt. The same protection as is presently afforded in the area of rights protected by the First and Fifth Amendments must be accorded to the rights under the Fourth and Ninth Amendments. Petitioner maintains further that the utilization of any evidence seized in violation of constitutional rights, or the introduction of that evidence into any proceeding regulated by the judiciary,

presents a situation under which this Court should exercise its supervisory powers in order to secure conformance with constitutional mandates and to prevent the complicity of the judiciary in illegal activity.

OPINION BELOW

The opinion of the Court of Appeals is reported at ..... F.2d ..... (9th Cir. 1971).

JURISDICTION

The Ninth Circuit Court of Appeals rendered its opinion and judgment on June 8, 1971. A timely petition for rehearing was filed, and rehearing was denied on June 23, 1971. The Petition for Certiorari was filed on July 22, 1971, and certiorari was granted December 13, 1971. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner Gelbard adopts herein the constitutional provisions and statutes submitted in the instant case under the title "Brief for Petitioners" and submits the following additional authorities:[1]

18 U.S.C. § 3504

California Penal Code § 631 *et seq.*

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1. The pertinent portions of these authorities will be submitted to the Court in a defetred appendix.

STATEMENT OF THE CASE

A telephone tap under 18 U.S.C. §§ 2516 through 2518 was conducted of an unknown person, probably an alleged bookmaker. This tap is hereinafter referred to as the "primary tap." At the time of the primary tap and the authorization for the interception, it is probable that Gelbard's name was unknown to the government, and became known only because his conversations were also intercepted in the course of his conversing over the telephone with the primary tap. The interceptions of Gelbard's conversations are hereinafter referred to as the "secondary tap."

As a result of the secondary tap, a search warrant issued to search and seize papers, books and other materials of Gelbard, the "probable cause" being (it is surmised) the conversations overheard in the course of the secondary tap. On January 25, 1971, the Honorable David W. Williams denied the motions to suppress the search warrant and for the production of the affidavits in support of the search warrant, and denied an evidentiary hearing therefor, summarily.

After the issuance of the search warrant to seize Gelbard's papers and other materials, Gelbard was subpoenaed to testify before the grand jury.

At the February 17, 1971 hearing, petitioner herein *did* refuse to answer any questions, on the ground that he had not been given the opportunity to review the application for the wire tap order, the order itself, or any conversations in which he engaged, so that petitioner could make appropriate motions.

Petitioner had attempted to file a motion to suppress evidence, to challenge the validity of the search warrants under Rule 41 of the Federal Rules of Criminal Procedure, and through his attorney had attempted to obtain an order shortening time so that such motions could be heard before the date on which he was to appear before the grand jury. When the order shortening time was denied, petitioner sought a Writ of Mandate/Prohibition from the Ninth Circuit Court of Appeals, which petition was denied "out of hand" (9th Cir. - No. 71-1065).

After the refusal to answer questions at the February 17, 1971 hearing, petitioner was then directed by the court to answer the questions; and upon further refusal of this court order, petitioner was held in contempt, with the opportunity to purge himself in the event he answered the questions, presumably pursuant to 28 U.S.C. § 1826(a). Pursuant to 28 U.S.C. § 1826(b), a stay of the order of contempt was issued by the District Court, and then by the Court of Appeals pending the prosecution of the appeal in expedited fashion. The Court of Appeals affirmed the lower court's contempt citation on June 8, 1971.

ARGUMENT

I

The Due Process Clause Of The United States Constitution Requires That Petitioner Be Given A Hearing Before Being Jailed, Pursuant To Title 28 United States Code § 1826, For Refusal To Answer Questions Based Upon An Illegal Invasion Of Privacy Pursuant To A Wire Tap Under Title

18 United States Code § 2510 *et seq.*

A. Under the circumstances of the instant case, a hearing is required by the Constitution in order to determine if there has been a violation of petitioner's rights.

This Court has made clear that due process requires the allowance of an adversary hearing under certain circumstances. This requirement is by no means limited to criminal actions or criminal defendants, but is based on a need to protect the loss of a constitutionally protected right. Obviously, the need for such a procedure is increased in a situation in which the failure to allow a hearing will itself result in a constitutional injury. Thus, a hearing is required under the First Amendment prior to seizure of allegedly obscene material in order to avoid the injury of censorship consequent to an illegal seizure. *Blount v. Rizzi* (1971), 91 S.Ct. 423. The right to be impartially heard and to challenge governmental action prior to the imposition of sanctions is fundamental under our system, and this right should be dispensed with only under the most exigent of circumstances. *Green v. United States* (1961), 365 U.S. 301. This concept has been consistently applied in the area of criminal contempt (*Bloom v. Illinois* [1968], 391 U.S. 194; *Groppi v. Leslie* [Decided January 13, 1972 - No. 70-112]). Similarly, the right to object to a violation of Fifth Amendment rights before the grand jury, and to have a speedy determination thereon, is well recognized. *United States v. Monia* (1943), 317 U.S. 424.

There is very little rational distinction between granting a hearing on waiver of Fifth Amendment rights as opposed

to Fourth or Ninth Amendment rights. A distinction could perhaps be drawn based upon the notion that the giving of testimony is itself the act which is prohibited by the Fifth Amendment. However, this Court has recognized the concept of the "fruit" of illegal activity. (In search and seizure cases see: *Wong Sun v. United States* (1963), 371 U.S. 471; with regard to coerced confessions see: *United States v. Bayer* (.....), 331 U.S. 532; *Darwin v. Conn* (1968), 391 U.S. 346, concurring and dissenting opinion by Justice Harlan.) Furthermore, with regard to a Ninth Amendment claim, the testimony itself is an intrusion into privacy.

Consequently, petitioner maintains that before a sanction, in the form of contempt, can be imposed upon a grand jury witness asserting a constitutional claim, the minimum protection of due process would require a hearing to determine the validity of that claim. It is difficult to imagine that the dictates of due process of law can be summarily avoided based on a need to expedite criminal investigation. If constitutional guarantees are to mean anything, they would seem to demand that liberty not be sacrificed to inquisition. The expediency of investigation can too easily erode these freedoms, and the time necessary to explore a constitutional claim is certainly worth the price of protecting the witness' rights and the integrity of the Constitution.

B. The Constitution of the United States demands that neither the judiciary nor the executive branches of the government utilize, for any purpose, evidence seized in violation of petitioner's constitutional

rights.

This Honorable Court has considered a variety of cases which dealt with the need to formulate workable rules for insuring that the mandate of the Fourth Amendment is followed both by law-enforcement officials and by the judiciary itself. In this regard, with special emphasis on the federal judiciary, the Court has long recognized that it is vested with the authority to utilize its "supervisory" powers in order to regulate the administration of justice throughout the federal system. One of the earliest cases in this area expressed (the necessity to have) concern for law-enforcement activities when the ". . . . courts themselves become instruments of law enforcement." *McNabb v. United States* (1943), 318 U.S. 332. Subsequently, in *Rea v. United States* (1956), 350 U.S. 214, the Court again exercised its supervisory powers to restrain federal officers from testifying in state courts concerning evidence seized in violation of Fourth Amendment rights. The counterpart to this case was *Elkins v. United States* (1960), 374 U.S. 206, in which the so-called "silver platter doctrine" was abrogated by this Court. The notion of the need to exercise the supervisory powers of the Court again arose in *Mallory v. United States* (1957), 354 U.S. 449, in which case this Court outlawed confessions obtained in a period of detention which violated the requirements of the Federal Rules of Criminal Procedure, Rule 5(a). Similarly, in *Katz v. United States* (1967), 389 U.S. 347, and in *Berger v. New York* (1967), 388 U.S. 41, this Court was ordered to the supervisory powers to implement the Congressional policies embodied in the Federal Communi-

cations Act.

Thus, the ability and duty of the Court to prohibit the use of unconstitutionally seized evidence has a long history in federal law. In this regard, it should be noted that the Fourth Amendment is certainly not limited in its effectiveness to the remedy of suppression of evidence. As discussed, *supra,* the exclusionary rule was itself merely a means to enforce the dictates of the amendment. It has further become apparent that the guarantee against unreasonable searches and seizures embodied in the Constitution is capable of providing whatever remedy is necessary to insure its vitality. Thus, in *Bivens v. 6 Unknown Narcotics Agents* (1971), 91 S.Ct. 101, this Court has allowed a civil remedy for violation of Fourth Amendment rights. The *Bivens* case makes clear that the Fourth Amendment is not merely an amendment to afford suppression of evidence in a criminal trial, but it is a provision which is to a large degree self-enforcing.

It is the position of petitioner Gelbard in this case that the utilization of evidence in a grand jury proceeding, which is itself a proceeding regulated by the judiciary, violates the dictates of the Fourth Amendment and necessitates the exercise of this Court's supervisory powers to insure that such evidence is not used *at all.* The rationale for this position is that under the cases cited above, this Court has the duty to supervise the judiciary in order to prevent its involvement in or condonation of the illegal activities of federal officers. Furthermore, under the present development of the grand jury system, in which the executive branch, through the United States Attorney, is primarily, if not totally, responsible for the presentation of

evidence and the verdict reached, it would appear that the judiciary has abrogated its duty to regulate its internal functions and has allowed the grand jury to become a technicality in which the need to follow the Constitution has somehow been dispensed with.

Thus, petitioner submits that under the supervisory powers of this Court there exists a duty to insure through a hearing that such illegal evidence does not creep into the grand jury proceedings and does not thereby tarnish the judiciary.[2]

There certainly can be no doubt that this Court has recognized the need for complete federal review of constitutional claims, especially claims dealing with *possible* violations of Fourth Amendment rights. *Koufman v. United States* (1969), 394 U.S. 217.

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2. Although petitioner is convinced of the correctness of the need for an exercise of the supervisory powers of this Court to prevent the utilization of unconstitutionally seized evidence before the grand jury, it should be noted that the most restrictive remedy from which petitioner could take advantage is the right to personally refuse to answer any questions propounded *to him* which are based on information directly or indirectly obtained through a violation of his constitutional rights. In this restricted form, petitioner does not ask that the illegally obtained evidence be suppressed, or that it not be used as a basis for questions posed to others. He wishes merely to invoke a personal right not to answer such questions.

Petitioner submits that this proposition is entirely consistent with–and required by–the Constitution and the laws of the United States. Certainly, there is no doubt that both the Fourth and Ninth Amendments deal with individual rights and protect the person. *Katz v. United States, supra; Griswold v. Connecticut* (1965), 381 U.S. 479. There is thus nothing illogical in allowing these rights to be exercised *by the person.* Furthermore, the analytical distinction between assertion of a constitutional right by a witness before the grand jury and the suppression of evidence obtained in violation of that right is not foreign to our law. For it is quite clear that a grand jury witness may refuse to answer a question based on Fifth Amendment grounds (*United States v. Monia, supra*), but that he may not subsequently quash the indictment on the ground that such evidence was the basis of the grand jury's finding. *United States v. Blue* (1965), 384 U.S. 255. Thus, even if the Court should not allow suppression of wire tap evidence, the issues with regard to a refusal of a witness to answer a question based on such evidence are completely different.

When examined in this light, the standing issue raised below by the Ninth Circuit becomes illusory. The standing issue, properly phrased under this heading, is whether a third party, a "non-aggrieved person," may refuse

C. **The statutory scheme is consistent with petitioner's request for a hearing.**

The statutory scheme of the wire tap statute with special regard to requirements for a hearing, especially 18 U.S.C. §§ 2515, 2518(9), and 2518(10(a), has been exhaustively examined in the "Brief for Petitioner," and those authorities and arguments are adopted herein. Petitioner, however, would draw special attention to 18 U.S.C. § 3504, a part of Public Law 91-452. That section provides:

> "§ 3504. Litigation concerning sources of evidence
>
> "(a) *In any* trial, *hearing, or other proceeding* in or *before any* court, *grand jury*, department, officer, agency, regulatory body, or other authority of the United States—
>
> "(1) *upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act* or because it was obtained by the exploitation of an unlawful act, the opponent of the claim

---

(2. cont'd)
to answer the questions based on the illegal evidence. Since the Fourth Amendment protects the person, it is illogical to assume that an aggrieved party, at any stage, cannot complain of the invasion of his rights. For, as we have seen, this Court has recognized personal remedies consonant with the intrusion. *Bivens, supra.*

With regard to the Ninth Amendment right to privacy, the same arguments as above apply generally. At this point, however, the unique statutory provisions of the State of California in the area of privacy become relevant through California Penal Code § 630, *et seq.* California has acted under the Ninth Amendment to protect the privacy of its citizens by outlawing wire taps of the kind here presumably utilized by the government. Thus, the wire tap act is, in California, a violation of the Ninth Amendment to the reservation of powers of the Tenth Amendment. If petitioner had responded to the questions of the grand jury, he would necessarily be coerced into relinquishing his rights under the Ninth Amendment. Before this drastic result is accomplished, petitioner should be able to assert his privilege and have the claim adjudicated.

shall affirm or deny the occurrence of the alleged unlawful act;

"(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and

"(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.

"(b) As used in this section *'unlawful act' means any* act the *use of any electronic, mechanical, or other device* (as defined in section 2510(5) of this title) *in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.*

"(b) The analysis of chapter 223, title 18, United States Code, is amended by adding at the end thereof the following new item:

'3504. Litigation concerning sources of evidence.'

"Sec. 703. *This title shall apply to all proceedings,*

regardless of when commenced, occurring after the date of its enactment. Paragraph (3) of subsection (a) of section 3504, chapter 223, title 18, United States Code, shall not apply to any proceeding in which all information to be relied upon to establish inadmissibility was possessed by the party making such claim and adduced in such proceeding prior to such enactment." (Emphasis added.)

This section makes obvious direct reference to the possible inadmissibility of evidence seized pursuant to a wire tap in a grand jury proceeding. If such a claim of an inadmissibility could not be raised by a witness, the inclusion of "grand jury" in paragraph (a) would be totally devoid of meaning. Moreover, the section refers to a "proceeding in or before any . . . grand jury . . . ," thus indicating that the breadth of the word "proceeding" in 18 U.S.C. § 2518(9), (10) includes a grand jury. If there should be any lingering doubt on this point, subsection (b) specifically defines "unlawful act" as " . . . the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) . . . ," thereby including all devices regulated pursuant to the wire tap statute. Section 3504 allows the claim of admissibility to be raised by any "aggrieved party." Subsection (a)(1). Also, the section provides for disclosure of evidence " . . . relevant to a pending claim of such inadmissibility." From the above, it is quite apparent that Congress intended to allow claims of inadmissibility of evidence to be raised by a grand jury witness. The section goes further than allowing merely of invocation of privilege not to

testify[3]; it provides for "inadmissibility," or, in other words, suppression of evidence. The section further requires an affirmance or denial by the opponent of the claim, thereby either forcing the evidence to be immediately suppressed upon the admission of the illegal act or putting the issue squarely in contention. Resolution of this question can logically only take place in an adversary hearing (the precise remedy petitioner argues is constitutionally mandated). The only remaining questions deal with the scope and type of inquiry in such a hearing.[4]

D. What kind of hearing should be allowed?

A hearing of the kind sought by petitioner presents several issues with regard to the scope of the inquiry to be allowed at such a hearing and the burden of proof upon the moving party. There are various indications that perhaps the proper standard for the burden of proof (to be placed on the government to justify the legality of the seized evidence) should be "beyond a reasonable doubt." For instance, in *Miranda v. Arizona* (1966), 384 U.S. 436, this Court determined that there was a "heavy burden" upon the government to establish a waiver of constitutional rights. Also, under *Chapman v. California* (1967) 386 U.S.

3. See footnote 2, *supra*, pp. 10, 11.

4. Finally, it must be noted that a serious question is presented in the instant case as to whether the wire tap statute is unconstitutional with regard to petitioner Gelbard, in that, apparently, petitioner was the victim of a wire tap which was not directed against him but which was subsequently used as the basis of attaining a wire tap specifically aimed at petitioner. There is a serious problem whether evidence obtained as a result of the first wire tap, and for which obviously there was no probable cause with regard to petitioner, can be utilized in itself or as a basis for obtaining further evidence. For, the initial seizure of evidence in that first wire tap was not based on any probable cause with respect to petitioner.

18, error is harmless only when it can be shown, beyond a reasonable doubt, that it had no impact on the verdict. Apparently, however, this Court has recently ruled that at least in the area of a pretrial determination on the voluntariness of a confession, the burden of proof of "beyond a reasonable doubt" would not be imposed on the prosecution. *Lego v. Twomey* (Dec. 1971 — 70-5037). However, aside from the decision in that case, petitioner feels that the arguments in relation to the need to protect the judiciary from engaging or condoning illegal police practices necessitates that a very strict burden be imposed upon the government to justify the search in a particular case. As is noted in the dissent by Justice Brennan in the *Lego* case, the fact finder's resolution (of conflicting testimony) at such a hearing is " . . . as a practical matter, the final resolution of the . . . issue." It would seem, therefore, that the absolute need of the judiciary to exercise its supervisory powers to prevent constitutional intrusions, and to follow the dictates of *In re Winship* (1970), 397 U.S. 358, demand that the burden imposed on the government at such hearing be "beyond a reasonable doubt."

Various other issues remain with regard to the *scope* of the inquiry to be allowed. For example, the problem remains as to how far the moving party may go to question the validity of the warrant in question. Thus, it must be determined whether the moving party will be able to attack the affidavit in support of the warrant, or, whether the affidavit and warrant must be judged on their face. See: *Giordenello v. United States* (1958), 357 U.S. 480.

Petitioner maintains that the extreme necessity for protection of constitutional rights and the solicitude

which has thus far been shown in the area of the Fourth Amendment (see *Koufman v. United States, supra*) demands that the scope of the hearing be enlarged sufficiently in order to insure protection of these rights.

CONCLUSION

For the reasons cited above, petitioner requests that an order issue returning proceedings in the instant case to the District Court for hearing on the issue asserted in petitioner's claim in refusing to answer questions posed by the grand jury; or, in the alternative, that on the basis of the unconstitutionality of the federal wire tap statutes of 18 U.S.C. § 2510, *et seq.*, an order issue quashing the subpoenas issued for petitioners in the instant case, and that the order of contempt be vacated.

Respectfully submitted,

BURTON MARKS

Attorney for Petitioner
David Gelbard

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on JANUARY 27th 1972, I served the within BRIEF FOR PETITIONER GELBARD (No. 71-110), on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

SOLICITOR GENERAL OF THE UNITED STATES
WASHINGTON, D. C. 20543 (3 copies)

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
12TH FLOOR - U. S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012 (2 copies)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JANUARY 27th 1972, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer